STATE OF WISCONSIN
Department of Industry, Labor & Human Relations

In the Matter of the PECFA Appeal of

Cumberland Farmers' Union Cooperative
1250 First Avenue
Cumberland WI 54829

PECFA Claim #54829-9999-50 Hearing #94-3 5

Final Decision

PRELIMINARY RECITALS

Pursuant to a petition for hearing filed April 7, 1994, under § 10 1. 02(6)(e), Wis. Stats., and §ILBR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, a hearing was commenced on March 6, 1995, at Eau Claire, Wisconsin. A proposed decision was issued on September 1, 1995, and the parties were provided a period of twenty (20) days to file objections.

The issues for determination are:

Whether the eligibility of the Cumberland Farmers' Union Cooperative (CFU) for a PECFA reimbursement has been properly denied on the basis of gross negligence in the maintenance of the petroleum product storage system or willful neglect in complying with the laws or rules of this state concerning the storage and handling of petroleum products.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Cumberland Farmers' Union Cooperative
1250 First Avenue
Cumberland WI 54829
By: Donald Best
Michael Best & Friedrich
One South Pinckney Street
P 0 Box 1806
Madison WI 53701-1806

Department of Industry, Labor and Human Relations
201 East Washington Avenue
P.O. Box 7946
MADISON WI 53707-7946
By: Kristiane Randal
Assistant General Counsel
P.O. Box 7946
Madison WI 53707-7946

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated October 20, 1995.

The matter now being ready for decision, I hereby issue the following

FINAL DECISION

The Proposed Decision dated September 1, 1995, is hereby adopted as the final decision of the department with the following modifications:

> The Discussion section of the Proposed Decision (pp. 6 - 12) is deleted and replaced by the following:
>
> **Discussion**
>
> CFU has maintained that, in responding to its gasoline dispenser failure by calling a contractor registered with the state to perform UST installation and repair and by following the directives of that contractor, it acted reasonably. It further argued that a "willful failure" to comply with the law requires knowledge of the law and that such knowledge was not proven by the department. CFU has maintained that the actions of Felker Petroleum were those of an independent contractor and cannot be imputed to CFU to create vicarious liability. Finally, CFU has also argued that the department has interpreted its rules on "gross negligence" and "willful neglect" an arbitrary and capricious manner.

I do not agree that CFU may claim immunity from the consequences of the acts of its contractors when it files an application for PECFA reimbursement. As a tank owner, CFU is responsible for compliance with ch. ILHR I0, Wis. Adm. Code. CFU has the freedom to decide which business functions it will hire employees to perform and which functions it will contract out, but hiring a contractor to handle its ILHR 10 responsibilities does not give it immunity from the rules any more than hiring a payroll management company would give it immunity from the requirements as to tax withholding. To establish a "willful" rule violation, it is not necessary to prove that the defendant has direct knowledge of all the terms of all of the rules. State v. Fettig, 172 Wis. 2d 428 (Ct. App. 1992), U.S. v. International Minerals & Chemical CoM., 402 U.S. 558, 91 S.Ct. 1697 (197 1).

The only issue to be considered in this proceeding is whether the conduct of CFU through its employees and agents, in responding to the gasoline dispenser failure and disconnecting the leak detector, amounted to gross negligence or willful neglect. While the actions taken can be fairly characterized in retrospect as negligent and ill-advised, I do not believe that they amounted to gross negligence or willful neglect of the law and rules.

In response to CFU's arguments that the terms "gross negligence" and "willful neglect" have been interpreted in an arbitrary manner, I do not agree. The evidence presented at the hearing showed that the PECFA program is being administered in a competent, conscientious and fair manner. Although my decision reverses the original determination of the PECFA staff, the question is a close one and the position presented by the department at the hearing had a reasonable basis in law and fact.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing send a written request to Department of Industry, Labor & Human Relations, Office of Legal Counsel P. 0. Box 7946, Madison, WI 53707-7946.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the date of this hearing decision(or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Department of Industry, Labor and Human Relations, Office of Legal Counsel 201 E. Washington Avenue, Room 400x, P. 0. Box 7946, Madison, WI 53707-7946.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated and mailed: February 15, 1996

Richard C. Wegner, Debuty Secretary
Department of Industry, Labor & Human Relations
P 0 Box 7946
Madison WI 53707-7946

cc: Parties in Interest and counsel

STATE OF WISCONSIN

DEPARTMENT OF INDUSTRY, *LABOR AND HUMAN RELATIONS*

PROPOSED **HEARING OFFICER RULING**
HEARING # 94-35

In **the matter of** the **denial of reimbursement of PECFA Program Funds to:**

Claim #54829-9999-50

Cumberland Farmer's Union Cooperative
CFU Cardtrol Island
1250 First Avenue
Cumberland, WI 54829

Appellant,

VS.

Secretary, Wisconsin Department of Industry, Labor and Human Relations,

Respondent,

State Hearing officer: Charles Schaefer

NOTICE OF RIGHTS

Attached is the Proposed Ruling in the above stated matter. Any partv aqqrieved by.the proposed ruling has the right to file Written objections to the proposed ruling. Such written objections must be filed within twenty (20) days from the date of this Proposed Ruling is mailed. The individual designated to make the FINAL Ruling of the Department of Industry, Labor and Human Relations in this matter is Patrick **J.** Osborne, Deputy Secretary of the Department of Industry, Labor and Human Relations, whose address is 201 East Washington Avenue, Room 40OX, Madison, Wisconsin 53707. All written objections should be addressed directly to Mr. Osborne.

Dated and Mailed: September 1, 1995

INTRODUCTION

Cumberland Farmers Union Cooperative (hereinafter referred to as CFU) suffered a release of petroleum from its underground storage tank system between July 19 and July 24, 1993. On March 4, 1994, CFU requested that Department of Industry, Labor and Human Relations (DILHR) determine that the site be eligible for reimbursement for cleanup costs under the PECFA Program. On March 21, 1994, the Department issued a determination denying site eligibility on the grounds that CFU had been 11 ... grossly negligent in the operation of the petroleum product storage tank system and operated the petroleum product storage system with willful neglect." Pursuant to an appeal to this determination, a hearing was held f rom March 6 through 10, 1995 before State Hearing Officer Charles Schaefer.

ISSUE FOR DETERMINATION

Whether CFU was grossly negligent in the operation of the petroleum product storage system with willful neglect.

APPEARANCES

For Cumberland Farmers Union Coop:

Michael Best & Friedrich
Attorney J. Donald Best,
Attorney David A. Crass,
Attorney Lauren A. Azar,
900 Firstar Plaza
One South Pinckney Street
P.O. Box 1806
Madison, WI 53701-1806

For Department of Industry,
Labor and Human Relations:

Kristiane Randal
Assistant Legal Counsel
201 East Washington Avenue
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Madison, WI 53707-7946

PROPOSED FINDINGS OF FACT

CFU operates a petroleum retail business at its facilities in Cumberland, Wisconsin. On July 19, 1993, a customer complained that no gasoline could be dispensed from its super unleaded gasoline pump. After confirming this failure, CFU personnel first called an electrician who visited the site and reported that the pump's electrical system was in working order.

CFU general manager, Earl McClelland, then directed the clerk, .Jan Matthys, to place a telephone call to Felker Petroleum, the contractor which had installed CFU's gasoline underground. storage tank (UST) and pumping system and the business which had performed subsequent repairs to that system. Felker Petroleum is located in Wausau, Wisconsin, more than 150 miles from Cumberland.

Jan Matthys spoke to a Mr. Harry Shallow of Felker Petroleum and described the problem with the super unleaded gasoline pump and told of the electrician's report. Mr. Shallow first instructed Mr. Matthys to check records of product inventory within its storage tank. The results of that inspection

were normal. Mr. Shallow then stated that 11 ... it kind of sounds like a bad leak detector head.,, He instructed Mr. Matthys to turn off electrical power to the system and then remove the leak detector head and replace it with a simple plug. Mr. Shallow provided Mr. Matthys with instructions as to where to locate the leak detector head,- a description of- its appearance, and the procedure for removing it. Mr. Shallow said that a new leak detector head would be sent to CFU.

The leak detector head is a device which, as its name implies, is designed to detect leaks within the underground tank and piping system. It does this by detecting changes in product pressure. A. change in pressure would indicate a leak within the system. When the device detects such a leak, it is to shut the system down. Mr Matthys removed the leak detector head from the tank piping system and replaced it with a plug as instructed **by** Mr. Shallow. When he did this, the system was left with no system for detecting leaks other than observation of inventory discrepancies.

CFU's super unleaded gasoline dispenser worked once the leak detector head was removed and the plug was installed in the piping system. Operation of the dispensing system continued in this Condition until July 24, 1993 when examination of inventory records revealed a large loss of super unleaded gasoline. Thereupon CFU shut the-system down and appropriate DNR personnel were notified. About 10,000 gallons of gasoline had been released from the UST into the ground by that time.

CONTENTION OF DEPARTMENT

It was the department's position that PECFA funds were properly denied CFU under Wis. Stat. 101. 143 (4) (g) which provides in pertinent part that:

> "The department shall deny a claim ... if any of the following applies:
>
> 3. The claimant has been grossly negligent in the maintenance of the petroleum product storage system...
>
> 6. The claimant willfully failed to comply with laws or rules of this state concerning the storage of petroleum products.',

Likewise, ILHR 47.20 Wis. Adm. Code provides in relevant part:

> "The department shall deny a claim for an award under s. ILHR 41.10 if any of the following conditions apply:
>
> (3). The claimant has been grossly negligent in the maintenance of the petroleum product storage system...,
>
> (7) - The claimant was guilty of willful neglect in complying with laws or rules of this state concerning the storage and handling of petroleum products.

The department argued that by removing the leak detector device, CFU was grossly negligent in maintenance of its petroleum product storage system. It further argued that CFU also "willfully failed to comply" and was "guilty of willful neglect in complying" with laws or rules of this state concerning the storage and handling of petroleum products.

The department noted that ILHR 47.015(43) Wis. Adm. Code provides the following definition:

> "Willful neglect means- the intentional failure to comply with the laws or rules of the state concerning the storage of petroleum products and may include, but is not limited to, the failure to:
>
> (a.) Conduct leak detection procedures;
>
> (b.) Take out of service a tank system that by reason of operational characteristics or leak detection is suspected of causing a discharge to the environment.
>
> (c.) Immediately shut down and repair a leaking tank system;
>
> (d.) Conduct a required product inventory;

The department argued that given this definition of "willful neglect", CFU' s conduct was virtually per se willfully negligent in complying with pertinent laws or rules.

The department cited certain rules appearing ILHR 10 Wis. Adm. Code which regulate storage of petroleum in underground storage tanks. Those rules impose a requirement that leak detector devices such as the one removed on July 19, 1993 be in place. The department also noted the following provisions of ILHR 10.

ILHR 10.63, Wis. Adm. Code, provides as follows:

> **"Conditions indicating suspected releases.** Owners and operators of storage tank systems shall follow the procedures in s. ILHR 10.635 when any of the following conditions exist:
>
> (1-) OPERATING CONDITIONS. Unusual operating conditions observed by owners-or operators, such as the erratic behavior of product dispensing equipment, the sudden loss of product from the tank system or an unexplained presence of water in the tank; or
>
> (2.) MONITORING RESULTS. Monitoring results from a -release detection method required under §ILHR 10.60 and 10.605 indicate that a release may have occurred...

ILHR 10.635, Wis. Adm. Code provides

"Confirming suspected releases. (1) GENERAL. Owners and operators shall immediately investigate and confirm all suspected releases within 7 days of discovery of any of the conditions described in s. ILHR 10. 63, unless:

(a.) System equipment or the monitoring device is found to be defective but not leaking and is immediately repaired, recalibrated or replaced and additional monitoring does not confirm the initial result ...

The department maintained that by disabling a system specifically designed to detect leaks, CFU engaged in "reckless or wanton disregard of the rights and safety of another or his property", and that this willingness to inflict injury, which the laws deems equivalent to an intent to injure, met the high standard of "gross negligence".

In addition to arguing that ILHR 47 defines "willful neglect" to squarely include CFU's conduct here, the department argued that the term "willful" did not require that CFU had knowledge that its conduct was in violation of the law'. Instead, it cited authority that with a hazardous material such as petroleum, the likelihood of regulation would be so great that a presumption of knowledge that this conduct would be regulated would exist.

CFU'S CONTENTIONS

CFU contented that the PECFA Program has a remedial purpose and that pertinent statutes and rules should be interpreted liberally so as to effect the purpose of the Act.

CFU maintained that in responding to its gasoline dispenser failure on July 19 by calling a contractor registered with the state to perform UST installation and repair and by following the directives of that contractor, it acted reasonably- It further argued that a "willful failure,, to comply with the law required knowledge of the law and that such knowledge was not proven by the department.

CFU noted that Felker Petroleum was an independent contractor and it argued that therefore, its wrongful conduct could not be imputed to CFU. Vicarious liability has been imposed only in instances significantly different from the case here.

CFU further contended that the department has failed to provide a consistent and comprehensive definition of either "gross negligence" or "willful neglect" and that its application of those definitions has been arbitrary and capricious to a degree that finding CFU guilty of either "gross negligence" or - "willful neglect" would be a violation of the equal protection clauses of the Wisconsin and U.S. constitutions.

STANDARD OF REVIEW

Both CFU and the department agree that the proper standard of review of the department's initial determination is *de novo* and that no deference was to be given to the department's decision. The department noted however that a statutory mandate for the department to issue a "just and reasonable"

decision required that the decision be "just and reasonable" within the context of the applicable statutes and regulations. This standard of review, as articulated by the parties, will be adopted for this case.

DISCUSSION

As noted by CFU, this is a case of first impression. The issue posed here is whether CFU's conduct in disabling a leak detector system, in violation of the law, is somehow insulated from culpability by virtue of the fact that CFU was advised to take this step by a contractor which specializes in repair of USTs.

Had there been no contact with Felker Petroleum, CFU's conduct would, in all likelihood, have been found to rise to a level which reached the "gross negligence, and/or "willful neglect" standard. When the leak detector device prevented gasoline from being dispensed, one of the possibilities that should at least have been considered was that the leak detector device was detecting a leak. Instead of simply overriding the system, a minimal standard of care would require that troubleshooting to determine whether the leak detector system (by shutting down the gasoline dispenser) was doing what it was supposed to do, should have occurred. Any contention that CFU did not know that this conduct violated the law or that it did not know that leak detection systems are designed to detect leaks would have been unpersuasive. A presumption that they had such knowledge might very well have been made.

However, instead of this, CFU called the contractor who was to have expertise in diagnosing and repairing such problems. In doing this, CFU did what PECFA Program personnel agree was the right thing to do. It followed the directions of the presumptive expert. CFU's failure was in not second guessing its expert. Normally, second guessing a specialist is a foolish thing to do. - In this instance it obviously would have been the right thing to do. CFU personnel apparently put to rest its normal critical faculties when advised by Felker Petroleum as to what to do. Again, normally, this is an appropriate and proper response. With the benefit of hindsight, CFU's unskeptical acceptance of such bad advice is startling. It should have been troubling to CFU that once the leak detector device was removed, there was no method for detecting leaks. The question is whether this failure amounts to gross negligence in the operation of its petroleum storage system.

Harry Shallow did direct Jan Matthys to check inventory records before concluding that the leak detector head was detective. From this, CFU management might have concluded that this troubleshooting effort satisfactorily ruled out that there was a leak in the system. Without being thoroughly knowledgeable about the law, it could also have concluded that temporarily overriding a leak detector system is legally acceptable during a period of replacement or repair. Such conclusions would not have been unreasonable given the nature of the instructions provided by Mr. Shallow and given.his presumptive expertise regarding UST systems and legal requirements surrounding those systems.

As noted by the department, "gross negligence,, is defined and distinguished from ordinary negligence in Ayala v. Farmers Mutual Automobile Insurance Co., 272 Wis. 629 at 637:

> "[o]rdinary negligence and gross negligence are distinct kinds of negligence, and do not grade into each other. Ordinary negligence lies in the field of inadvertence, and gross negligence in the field of actual or constructive intent to injure.

CFU,s conduct may have constituted ordinary negligence. However, by telephoning the contractor who ordinarily performed the work on the gasoline dispensing system and following the

directions of its representative, it was not engaged in conduct demonstrating an "...actual or constructive intent to injure" and there was therefore no gross negligence.

The department argues that CFU should not have assumed that Harry Shallow was an expert in responding to gasoline dispenser repair problems. Earlier, sales documentation which issued by Felker Petroleum to CFU designated Mr. Shallow as a "salesman". From this, the department argued that CFU had available to it knowledge that he was not a service expert.

First of all, Mr. Shallow could have been both a repair specialist and a salesman. Additionally, Mr. Shallow responded to the question of Mr. Matthys in a way which would have indicated that he was an appropriate person to speak with- He demonstrated that he was knowledgeable in the UST system. When Mr. Matthys called the contractor who specializes in repairing the problem CFU was experiencing and received the response that he did-from Mr Shallow, he would have been justified in concluding that Mr. Shallow was an expert. To impose a duty on Mr. Matthys that he ask questions to establish Mr. Shallow's expertise would require him to engage in eccentric behavior having primary result of annoying the contractor's representative.

The department also argued that Mr. Shallow did not actually advise CFU to operate its gasoline dispenser system without the leak detector device. CFU instead took this step on its own. This argument is without merit. Unless Mr. Shallow were expecting CFU to continue to operate its system without the leak detector device, he would never had advised CFU to install the plug. The - existing leak detector device could simply have been left in place if the system were not to be used otherwise. CFU would have been justified in concluding that Mr. Shallow was implying an expectation of future use of the system after the plug was installed.

Felker Petroleum is an established UST installation and repair business with a reputation for reliability. Its representative, Mr. Shallow, did not take a carefree or whimsical approach to Jan Matthys telephone call on July 19. He did nothing to indicate that his advice would require that CFU take a risk or that it should be concealed from the government authorities. Mr. Matthys had no reason, based on Mr. Shallow's telephone demeanor, for being doubtful of the wisdom of his advice.

Felker Petroleum may have been grossly negligent in- advising CFU to override its leak detector system. However, that question need not be answered here because Felker Petroleum had an independent contractor relationship with CFU. Its putative negligence cannot be imputed to CFU. The department has not argued that fault should be so imputed.

The remaining question is whether, by the definition of "willful neglect" appearing in ILHR 47 Wis. Adm. Code, CFU must be found guilty of willful neglect in complying with laws and rules related to USTs.[1]

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[1]Wis. Stat. 101. 143 (4) (g) 6 provides for site ineligibility for a claimant who "willfully failed to comply with the laws or rules of the state concerning the storage of petroleum products. ILHR 47-20 provides that PECFA benefits will be denied to a claimant who "… was guilty of willful neglect in complying with the laws or rules of the state concerning the storage and handling of petroleum

As noted before, ILHR 47.015(43) defines "willful neglect" as follows:

"Willful neglect" means the intentional failure to comply with the laws or rules of the state concerning the storage of petroleum products and may include, but is not limited to, the failure to:

(a.) Conduct leak detection procedures,

(b.) Take out of service a tank system that by reason of operational characteristics or leak detection is suspected of causing a discharge to the environment.

(C.) Immediately shut down and repair a leaking tank system;

(d.) Conduct a required product- inventory;

Resolution of this question turns on the meaning that should be attached to the term "willful". The department argues that it merely means volitional and requires no proof of knowledge that the conduct was a violation of the law. CFU argues that this interpretation would render the term superfluous. It argued that in order for there to be a willful failure, there must be a knowing violation of UST laws.

It is concluded that in this instance, "willfulness" requires. a knowledge that the conduct in question is illegal but that that knowledge may be presumed. In support of making such a presumption, the department cited United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971) which held-that where "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."

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products." Although the term "willful neglect" differs from the term "willfully failed," on their face, the terms appear to be referring to the same concept. There was no showing that they have developed distinct and separate meanings or contents. Therefore, at least for purposes of this case, the two terms will be treated as being identical.

ILHR 47 defines "willful neglect" as an intentional failure to comply with petroleum storage laws. For a failure to comply with a law to be "intentional", there must be presumed or actual knowledge of the law. Otherwise, any such failure would be unintentional. ILHR 10 requires that a leak detector system be in place in any UST system. CFU was out of compliance with this rule from July 19 through 24, 1993. However, for this to be found to be a violation of ILHR 47.20(7) a showing of knowledge of this law must be made.

"Willful neglect" is defined to include the failure to "take out of service a tank system that by reason of operational characteristics or leak detection is suspected of causing a discharge to the environment." The department argued that this definition requires, as a matter of law, a finding of suspicion whenever certain operational characteristics or leak detection are present. However, the definition of "willful neglect" does not compel that conclusion. First of all, "suspicion" is a mental process. To find that it must exist as a matter of law requires a strained act of construction. "Operational characteristics or leak detection" may give rise to a rebuttable presumption of suspicion. This portion of the willful neglect definition requires a specific finding that CFU suspected its tank system was causing a discharge into the environment. It goes on to state that "operational characteristics or leak detection" would be -the factors that would create the suspicion. However, the definition does not state that if "operational characteristics or leak detection" are present, suspicion must therefore exist.

When a leak detector device detects a leak, it shuts down the gasoline dispensing system as CFU's leak detector shut down CFU's system on July 19, 1993. This definitely should have given rise to a suspicion that the leak detector was detecting a leak. Ordinarily, any claim that the minds of CFU personnel were free of such suspicion would, as the department argued, be seen as disingenuous. To respond to the difficulties of proving what was in someone's mind, it is appropriate to draw a presumption of suspicion. Likewise, the reasoning in the United States v. International Minerals & Chem. case, is appropriate here. Given the extensive and comprehensive regulation of UST'S, the likelihood that disabling a leak detector device is prohibited by law is so great that those who own and operate such systems would be presumed to be aware of this fact.

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2 ILHR 10.635 imposes an obliagation to investigate a suspected discharge whenever there is a leak reponse for a lead detector device. However, that investigation must occur within 7 days of the response. In this case, CFU investigated and confirmed the release within 5 days of the response. It was therefore in technical compliance with ILHR 10.635.

In this instance, CFU, by telephoning Felker Petroleum and following the advice of its representative, has rebutted the two presumptions referred to above. A presumption also exists that a contractor whose business it is to specialize in the very matter where a problem arises will give advice which is correct and proper. CFU could reasonably have drawn such a presumption and operated on the basis of it. CFU personnel's behavior after the telephone call with Mr. Shallow certainly indicates that they did so. CFU's failure to regularly monitor inventory levels on and after July 19, while imprudent, does indicate that its personnel had no suspicion of the leak before July 24. No benefit to them would be apparent for simply ignoring an ongoing leak. Also, CFU personnel could reasonably have presumed that if Felker Petroleum's representative advised installing a plug in place of the leak detector device, taking this step was legally acceptable.

It should also be noted that the task of a leak detector device is difficult and requires close tolerance responses. For that reason, the devices are commonly unreliable and subject to false responses. While the record is devoid of anything that would excuse Mr. Shallow's advice, his diagnosis would have been accurate in the vast majority of leak detector responses.

The department would impose upon CFU the obligation to do something more than follow the advice of a contractor specialist. If there were a showing that .CFU was in some way seeking to hide behind the advice of an expert in order to justify its own bad faith conduct, such requirement would be justified. However, no such showing exists here. As it is, such a requirement would impose a duty contrary to the expectation created by day to day experience. Also, it would be a potentially dangerous duty. it would require that nonexperts doubt the diagnosis and advice of experts. Generally, expertise confers knowledge and wisdom in problem solving that is greater than that of nonexperts.

CFU has argued that DILHR has failed to provide a uniform definition of either "gross negligence,, or "willful neglect" and has otherwise failed to establish an institutional framework which would permit a consistent application of these standards. it maintained that its application of the law in other cases has demonstrated an arbitrary and capricious exercise of its administrative responsibilities. It therefore maintained that denial of PECFA benefits to CFU would raise constitutional questions--.

Responding to these contentions is not necessary for resolution of this case. However, since it was the subject of so much attention at the hearing, I will speak to it.

If CFU has a legitimate complaint regarding the overall administration of the PECFA Program, it was not demonstrated by the evidence presented at the hearing. That evidence instead showed that the program is being administered in a competent,

conscientious and fair manner. As with any human endeavor, points of fallibility may exist. However, in the face of- limited administrative resources and a burgeoning mission, the evidence at the hearing tended to show that the program is operated well.

More specifically, CFU argued that it was treated in a manner inconsistent with PECFA's rulings in other cases. However, this case is sufficiently distinct from any other case presented as to defy comparison. I was unable to discern any inconsistency in administration. Although in the final analysis, I conclude that the department's initial decision was not "just and reasonable" under the applicable statutes and regulations, the question presented here is a close one. There is merit to the position and arguments of the department. Because of the forgoing, I believe CFU's focus and attention on other PECFA cases and on the internal administration of the program was misplaced.

CONCLUSIONS OF LAW

NOW, THEREFORE, it is concluded that CFU was neither grossly negligent in the maintenance of its petroleum products storage system nor was it guilty of willful neglect in complying with laws and rules of this state concerning the storage and handling of petroleum products, within the meaning of Wis. stat. 101.143(4) (g) or ILHR 47.20.

PROPOSED RULING

CFU is eligible for PECFA reimbursement for remediation costs arising from a release occurring between July 19 and 24, 1993, as otherwise provided by law.

Charles Schaefer
State Hearing Officer
Eau Claire Hearing office
2105 Heights Drive
Eau Claire, WI 54701

Dated and Mailed: September 1, 1995

STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

Cumberland Farmer's Union Cooperative
CFU Cardtrol Island
1250 First Avenue
Cumberland, WI 54829

Appellant,

VS.

RULING ON MOTION FOR REQUEST OF DISCOVERY

Secretary, Wisconsin Department of Industry, Labor and Human Relations,

PECFA CLAIM #54829-9999-50

Respondent

HEARING # 94-35

The applicant requested that the hearing examiner order particular department employes to respond to certain discovery tools, including depositions, written interrogatories and written requests for admissions. Although I agree with the applicant that the use of discovery might well aid the efficient resolution of the issues in this case, I conclude that Chapter 227 stats. precludes me from ordering that the department respond to discovery. Therefore, the motion is denied.

DISCUSSION

Chapter *227* Wis. stats. establishes the procedures to be used in PECFA hearings. A PECFA case is a. "class 3" proceeding under Wis. Stat. 227.01(3)(c).

Section 227.45(7) directs that "the taking and preservation of evidence" or discovery be permitted under certain enumerated circumstances when a particular witness is not available. The applicant has not proposed that any of. those circumstances exist here. Otherwise, under that section, in a class 3 proceeding, ' ... an agency may by rule permit the taking and preservation of evidence [discovery] . . ". Under the pertinent rule, ILHR 47, Wis. Admin. Code, there is no provision, permitting discovery. Without such a rule, I do not have authority to permit discovery..

The applicant argues that the provision referred to above simply grants an agency the authority to regulate discovery. While any administrative rule would, no doubt, regulate the use of discovery, my adopting this argument would require a clear misinterpretation of section 227.45(7). The intent of the statute is to restrict use of discovery to those instances in which an agency has promulgated a rule providing for it.

Section 227.46(l) provides a grant of authority to hearing examiners at hearings. That grant includes authority to "take depositions or have depositions taken when permitted *by* law". The applicant argues that authority to order discovery in this case resides here. However, it is specifically limited to those instances in which the law permits it. It is therefore subject to the limitations appearing in section 227.45(7).

ORDER

The hearing examiner hereby denies the applicant's request for prehearing discovery.

Dated and Mailed: November 11, 1994

Charles Schaefer
Hearing Examiner
Eau Claire Hearing Office
2105 Heights Drive
Eau Claire, WI 54701
(715) 836-2738

cc: Attorney David A. Crass
Kristiane Randal, Assistant Legal Counsel